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Nos. 93-1612, 93-1613

In The

Supreme Court of the United States

October Term, 1994

NationsBank of North Carolina, N.A., *et al.*,
Petitioners,

v.

Variable Annuity Life Insurance Company,
Respondent.

Eugene Ludwig, Comptroller Of The Currency, *et al.*,
Petitioners,

v.

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On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

GARY E. HUGHES
ALLEN R. CASKIE
(Counsel of Record)
Phillip E. Stano
American Council of Life Ins.
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2599
(202) 624-2120

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INTEREST OF THE *AMICUS CURIAE*

The American Council of Life Insurance ("ACLI") is a non-profit trade association of 640 stock and mutual life insurance companies. Collectively, ACLI member companies hold approximately 91 percent of the life insurance in force in the nation. ACLI member companies market fixed and variable annuities in all fifty states, and have always regarded annuities

as a true insurance product. ACLI has long been active in administrative, legislative, and litigation matters regarding the permissible scope of insurance activities by banks.

ACLI has a strong interest in this case because its members will suffer substantial competitive injury if all national banks are permitted to sell annuities. In addition, the Comptroller's determination that annuities are "financial investment instruments," and not "insurance" products, might erode the critical distinction between "insurance" and true financial instruments which applies under Federal tax and securities laws.

By permitting all national banks to sell annuities, the Comptroller misinterpreted Congress' direction in 12 U.S.C. § 92 ("Section 92") that only national banks located in small towns may sell insurance. The Comptroller's unilateral decision also undermines the barriers between banking and insurance which Congress has erected to ensure stability and fairness in financial markets and in the insurance industry.

SUMMARY OF ARGUMENT

The Comptroller's decision to allow all national banks to sell annuities is contrary to law and is not entitled to deference. Petitioners invoke this Court's ruling in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) as a talisman to ward off meaningful judicial review of the Comptroller's decision. But petitioners' heavy reliance upon *Chevron* betrays a fundamental misconception of the proper roles of the judicial and executive branches of government and far exceeds the logical underpinnings of that precedent.

ARGUMENT

THE COMPTROLLER'S APPROVAL DOES NOT MERIT DEFERENCE

The court of appeals held in this case that "[i]t is plain from the language of the statute, and from the legislative history, that § 92 prohibits national banks . . . from selling insurance products in towns with population greater than 5,000." NationsBank Pet. App. 10a. The court of appeals also correctly concluded that "annuities are an insurance product, both historically and functionally." *Id.* Finding that the intent of Congress was clear, the court of appeals held that deference to the Comptroller's statutory interpretation was not appropriate under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). NationsBank Pet. App. 9a.

Nevertheless, petitioners insist that Section 92 contains latent ambiguities and that, under *Chevron*, the Comptroller's contrary interpretation therefore should trump the court of appeals' careful construction of Section 92. Petitioners' invocation of *Chevron* far exceeds the rationale of that decision, however, and minimizes the proper role of the judiciary in our government.

A. The Constitutional Separation of Powers Both Animates *Chevron* and Limits It

"The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. From the founding of the Republic, this grant of authority has been interpreted to mean that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch (5 U.S.) 137, 177 (1803); *see also United States v. Nixon*, 418 U.S. 683, 705 (1974) ("reaffirm[ing] that it is the province and duty of this

Court 'to say what the law is'") (quoting *Marbury*). As this Court explained in *INS v. Chadha*, 462 U.S. 919, 951 (1983):

> The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to exceed the outer limit of its power, even to accomplish desirable objectives, must be resisted."

The constitutional separation of powers was not instituted to "promote governmental efficiency" but rather "as a bulwark against tyranny." *United States v. Brown*, 381 U.S. 437, 443 (1965); *Chadha*, 462 U.S. at 959 ("Framers ranked other values higher than efficiency"). Each Branch, therefore, has a constitutional duty to prevent the other Branches from encroaching upon their assigned responsibility. Indeed, the Constitution not only enables the Branches to safeguard their powers from invasion by the other Branches, but also requires "that none of the Branches will *itself* alienate its assigned powers." *Peretz v. United States*, 501 U.S. 923, 956 (1991) (Scalia, J., dissenting) (emphasis in original).

The principles articulated in *Chevron* derive from separation of powers concerns, as the Court sought to accord proper scope to the decisions of administrative officers that were based on powers expressly delegated to those officers by Congress. Nevertheless, there are important limits on administrative discretion which also derive from the need to preserve constitutional separation of powers. Just as the constitutional structure protects the powers of executive officials, it also ensures that legal restrictions placed on those officials by Congress will be enforced by the courts. Indeed, the Administrative Procedure Act also commands that "the reviewing *court* shall decide all

relevant questions of law [and] interpret constitutional and statutory provisions." 5 U.S.C. § 706 (emphasis added). Thus, courts reviewing agency interpretations of law must not "slip into judicial inertia" or "rubber stamp" agency decisions. *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Auth.*, 464 U.S. 89, 97 (1983) (quoting *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) and *NLRB v. Brown*, 380 U.S. 278, 291-92 (1965)).

B. The *Chevron* Ruling Was Based On Five Factors Present in That Case

To understand the constraints on executive discretion that are inherent in *Chevron*, it is important to review the case itself, which can be obscured by the enthusiastic pleadings of executive agencies and their client entities seeking to vindicate agency actions. *Chevron* considered the meaning of the term "stationary sources" as used in the Clean Air Act Amendments of 1977. Pursuant to its statutory authority to administer and interpret the Act, the EPA published regulations allowing states to treat all pollution-emitting devices within the same industrial grouping as a single "stationary source" (or "bubble"). Although the Court ultimately concluded that the statutory language was "not dispositive" (467 U.S. at 862), the Court independently construed the meaning of the statute before concluding that EPA's interpretation was sound.

After carefully examining the language and structure of the Act and the relevant legislative history, the Court observed that EPA's interpretation was supported by the definition of "stationary source" in another section of the Act.[1] 467 U.S. at 860. The Court also pointed to the use of the word "facility" in the Act's definition of "major stationary source." *Id.* at 851. The Court held that the "ordinary meaning" of the term "facility" in those

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[1] The statute defined "stationary source" as "any building, structure, facility or installation which emits or may emit any air pollutant." Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676.

definitions "connote[s] an entire plant as opposed to its constituent parts." *Id.* at 860. The Court observed that the definitions "shed[] as much light on the meaning of the word 'source' as anything in the statute" and "impl[y] a bubble concept of sorts." *Id.* at 860-61. The Court also added that the "plantwide definition" adopted by EPA was "fully consistent" with the policy concerns that motivated enactment of the statute. *Id.* at 863.

Having conducted its own analysis of the statute, the Court concluded that EPA's regulation was "a reasonable accommodation of manifestly competing interests and is entitled to deference." *Id.* at 865. The Court gave several reasons why deference was appropriate (*id.* at 862, 865-66):[2]

(1) The statute did not "reveal an actual intent of Congress."

(2) Congress expressly or implicitly left a "gap" for the agency to fill.

(3) "[T]he regulatory scheme is technical and complex," the agency has "great expertise," and "[j]udges are not experts in the field."

(4) "[T]he agency considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies."

(5) The Chief Executive is accountable to the people, but judges "are not part of either political branch of the Government." Agencies, therefore, are better positioned to make "policy choices."

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[2] These reasons often have been repeated in subsequent cases applying *Chevron*. *See, e.g.*, *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 697 (1991) (statute produced "complex and highly technical regulatory program" "requir[ing] significant expertise" and exercise of policy judgments); *Dole v.*

C. The Five Factors Supporting Deference In *Chevron* Are Not Present Here

Although five reasons supported deference to the agency action in *Chevron*, in this case four of them militate against judicial deference to the Comptroller's action, and the impact of the fifth factor is ambiguous.

1. The Intent of Congress in Section 92 Is Clear

As the court of appeals held, application of the maxim *expressio unius est exclusio alterius* demonstrates that Congress intended to limit insurance agency activities to national banks located in small towns. NationsBank Pet App. 10a; Denise W. DeFranco, *Chevron and Canons of Statutory Construction*, 58 Geo. Wash. L. Rev. 829, 839 (1990) (*expressio unius* canon is particularly apt tool under *Chevron* to determine congressional intent).[3] The legislative history confirms this conclusion. *See* 53 Cong. Rec. 11,001 (1916) (insurance agency "authority should be limited to banks in small communities"). Even the Comptroller now concedes this point. *See* Fed. Br. at 40-41. The court of appeals further concluded that annuities are properly regarded as a form of insurance. NationsBank Pet. App. 10a. Since the traditional tools of statutory construction establish the intent of Congress, "that is the end of the matter," and this case presents no basis for deferring to the Comptroller. *Chevron*, 467 U.S. at 842-43.

United Steelworkers, 494 U.S. 26, 42-43 (1990) (deference not appropriate where intent of Congress is clear); *United States v. Fulton*, 475 U.S. 657, 666-667 (1986) (statute unclear on question of "interim" rate making authority; conflicting policies committed to agency's care by statute); *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 125 (1985) (EPA "charged with administering" "complex statute").

[3] This Court has long considered *expressio unius* to be "an universal maxim in the construction of statutes." *United States v. Arredondo*, 6 Pet. (31 U.S.) 691, 725 (1832); *see also Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993) (applying maxim).

Even if a court finds some ambiguity regarding Congress' intent, deference to the agency's view is not necessarily appropriate. To read *Chevron* as laying down a "blanket rule" that courts must "always defer to the agency when the statute is silent" would be "seriously overbroad, counterproductive and sometimes senseless." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 373 (1986). As one *Chevron* proponent aptly observed, nearly every statute, if studied hard enough, can be made to yield up some ambiguity. *See* Laurence H. Silberman, *Chevron — The Intersection of Law & Policy*, 58 Geo. Wash. L. Rev. 821, 826 (1990). But if that ambiguity always means that courts must defer to administrative interpretations, then the judicial role "to say what the law is" will have been greatly diminished. *Cf. Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 831 (1992) ("[d]eference does not mean acquiescence"); *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting) (*Chevron* is "not a declaration that, when statutory construction becomes difficult, we will throw up our hands and let regulatory agencies do it for us").

The extent to which a court will defer to an administrative interpretation should be proportional to the level of ambiguity inherent in the statute. Deference, therefore, is most appropriate when the agency's interpretation is as plausible as competing interpretations. *See, e.g., United States v. Fulton*, 475 U.S. 657, 667 (1986) (agency construction was "as consistent with the bare statutory language" as alternative interpretation). Even if an agency's interpretation is doubtful, substantial ambiguity in the statute may prevent the court from concluding that the agency is wrong. Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2092 (1990); *cf. MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 114 S. Ct. 2223, 2231 (1994) ("an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear"). At some point, the agency's view

becomes so stretched as to be unreasonable, and deference ceases. *Chevron*, 467 U.S. at 843. But since any statutory ambiguity in this case is small and the Comptroller's interpretation is unsupported by any statutory language, his views are not entitled to deference.

2. Section 92 Leaves No "Gap" for the Comptroller to Fill

Unlike *Chevron* and many of its progeny, Congress did not leave a gap in Section 92 for the Comptroller to fill. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990) (collecting authorities); *see also Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring); Sunstein, at 2076. Congress has not given the Comptroller broad authority to administer the statute or to promulgate interpretive or legislative regulations. Nor, for that matter, does the statute appear to leave undefined any terms for later administrative clarification.

To the contrary, Section 92 is a straightforward declaration on the insurance powers of national banks. Nothing in the statutory language or legislative history suggests that the term "insurance" meant anything other than "its accepted ordinary commercial usage": a usage that surely encompassed annuities. *Federal Reserve Bd. v. Dimension Financial Corp.*, 474 U.S. 361, 373 (1986) (Board's evolving definition of "commercial loan" was unreasonable).

The Comptroller's only role under Section 92 is to make rules regulating the manner in which small-town national banks may exercise their insurance agency powers. The statute provides that small-town national banks "may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as agent for any . . . insurance company . . . ." The Comptroller's delegated authority is thus to regulate the insurance activities of these national banks in smaller communities,

but does not include the power the Comptroller now claims to grant insurance powers to all of the other national banks.

3. Section 92 Establishes a Simple Regulatory Structure

The regulatory scheme established by Congress in Section 92 is simple, not complex. Either a bank is located in a town with a population of 5,000 or less, or it is not; either such a small-town national bank is acting as an agent for an insurance company in the sale of insurance, or it is not. These straightforward either-or propositions bear no resemblance to complex regulatory schemes, such as the environmental legislation in *Chevron* or the black lung benefits program in *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680 (1991). There is no scientific inquiry in this case; nor are there feasibility or practicability studies or decisions to be made. In fact, Section 92 includes no technical words or terms of art.

Because of this textual and conceptual simplicity, the Comptroller is no better qualified to interpret the statute than is this Court. Accurate interpretation of Section 92 does not require knowledge peculiarly within the expertise of the Comptroller: it simply requires faithful adherence to the text and cognizance of the applicable legislative history and historical context. Deciding questions of law is what courts do best, and is a peculiarly judicial function. *See, e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987) ("pure question of statutory construction [is] for the courts to decide"); Sunstein, at 2076, 2084-85.

To the extent that any expertise is required to interpret Section 92, moreover, the subject of that expertise is insurance, a topic on which the Comptroller has greater experience in purchasing the product as a consumer than regulating it as a public official. In fact, Congress has acknowledged that the States, not the federal government, possess expertise in insurance matters. Congress' recognition of the "supremacy of the

States in the realm of insurance" is codified in the McCarran-Ferguson Act, 59 Stat. 34 (1945). *United States Dep't of Treasury v. Fabe*, 113 S. Ct. 2202, 2207 (1993). Given the uniform view of the States that annuities are insurance, *see* NationsBank Pet. App. 11a, the Comptroller's contrary determination is highly suspect.[4]

Indeed, the Comptroller's analysis of annuities is contrary to basic insurance principles implemented by ACLI's members every day. The Comptroller discounts the risk-shifting and risk-distributing features of annuities when he claims that annuities cannot be insurance because they do not provide indemnification, and when he asserts that annuities cannot be insurance because they contain significant investment features.[5]

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[4] Amicus American Bankers Association (ABA) seeks to challenge the court of appeals' related determination that the sale of insurance is not incidental to banking by suggesting in its brief (p. 13) that "as many as thirty-four states allow their own state-chartered banks to engage in the insurance agency business in some form or another." The brief then directs attention to an Appendix, which contains a chart referring to the laws or regulations or supposed administrative practices of 45 states. This assertion is very misleading.

Of the 34 states claimed to give insurance agency powers to state-chartered banks, ten states have statutes like Section 92, giving insurance agency powers only to banks in towns of 5,000 or fewer inhabitants (Arkansas, Colorado, Florida, Georgia, Kansas, Minnesota, Missouri, New Mexico, and Washington), or 7,000 or fewer inhabitants (Mississippi). Four more of the states claimed by the ABA actually prohibit insurance sales except for grandfathered institutions (Connecticut, Kentucky, Tennessee, and Louisiana). One state merely allows a bank to own up to 25 percent of an insurance agency. Me. Rev. Stat. Ann. tit. 24-A, § 1514-A (West 1993). Another state specifically denies state banks the power to act as agent for life insurance companies. Ind. Code Ann. § 28-1-11-2 (Burns 1994). Contrary to the impression created by the ABA, Alaska prohibits state-chartered banks to sell insurance. Alaska Stat. § 06.05.272(d) (1993). Thus, out of the 34 states that the ABA claims permit state banks to sell insurance, only half (17) do so in a way that appreciably exceeds the scope of Section 92.

[5] This Court has long understood that insurance does not necessarily involve indemnification and that insurance often performs an investment

But the ACLI members who have issued 90% of the $1,041,226,000,000 of annuities currently in force know that they have assumed concrete mortality risk with every life annuity sold. That mortality risk is not changed in any material way because annuities, like many forms of insurance, may also serve an investment function. Rather than assisting the Court with his superior experience, the Comptroller largely has provided misconceptions regarding insurance in his attempt to find statutory ambiguity where there is none.

4. The Comptroller's Unilateral Action Involved No Deliberative or Participatory Procedures

There is no indication that the Comptroller heard both sides of this dispute in order to "consider[] the matter in a detailed and reasoned fashion" or "reconcil[e] competing policies." *Chevron*, 467 U.S. at 865. The Comptroller received a request from NationsBank for insurance agency powers, and granted it. There was no adversarial hearing, as there would been if the Comptroller had made an adjudicative determination. There was no opportunity for public notice and comment, as there would have been if the Comptroller had promulgated a legislative regulation. The Comptroller's decision was reached behind closed doors, after hearing only from NationsBank. A decision reached through such a one-sided process neither inspires confidence nor commands deference.

The absence of any truth-protecting procedural safeguards in this case demonstrates why purely interpretive opinions of administrative agencies should not be entitled to special deference. Although an interpretive ruling, logically presented, may have the "power to persuade," it cannot have the "power to

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function. *See, e.g., Central Nat'l Bank of Washington v. Hume*, 128 U.S. 195, 205 (1888) (life insurance is not pure indemnity); *Grigsby v. Russell*, 222 U.S. 149, 156 (1911) (Holmes, J.) ("life insurance has become in our days one of the best recognized forms of investment;" view that life insurance is indemnity "long has disappeared").

control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (interpretive rules entitled only to "some weight on judicial review"). Last Term, the Court expressly reserved the question whether "an agency interpretation expressed in a memorandum" is entitled to "less deference under Chevron than an interpretation adopted by rule published in the Federal Register, or by adjudication." *City of Chicago v. Environmental Defense Fund*, 114 S. Ct. 1588, 1594 n.5 (1994). Because "truth" "is best discovered by powerful statements on both sides of the question," *United States v. Cronic*, 466 U.S. 648, 655 (1984), it makes little sense to defer to decisions, like the Comptroller's Approval, that are reached without a full ventilation of the issue by affected parties.

The Comptroller in this case did not even purport to balance competing policies. His decision was motivated by a single policy: to "provide a valuable additional source of income" to national banks. NationsBank Pet. App. 47a. He cited Comptroller Williams' 1916 letter to Congress to support this policy (NationsBank Pet. App. 42a), but utterly ignored the competing policies articulated by Comptroller Williams: (i) that the need for insurance revenue was peculiar to small-town banks; (ii) that banks should focus on banking; (iii) that confining insurance powers to small-town national banks would not "trespass upon outside business naturally belonging to others;" and (iv) that banks ought not to become like "department stores." 53 Cong. Rec. 11,001 (1916). The Comptroller's failure to hear both sides undercuts a central premise for deference under *Chevron* since he cannot "be trusted to give a properly balanced answer." Breyer, *supra*, at 371.

5. State Insurance Regulators Are Politically Accountable

The Comptroller is politically accountable whereas the courts are not. The Comptroller's comparative advantage over

the courts in political accountability is largely offset, however, by the overwhelming consensus among the States, who also are politically accountable, that annuities are insurance. *See* NationsBank Pet. App. 11a; VALIC Br. at 29-30. Many states also have adopted "anti-affiliation" statutes specifically barring banks from selling insurance. *E.g.*, Conn. Gen. Stat. Ann. § 38a-775 (West 1994); Fla. Stat. Ann. § 626.988 (West 1994); Pa. Stat. Ann. tit. 40, § 281(b) (1994).

Greater political accountability, however, cannot be the sole basis for special deference to statutory interpretations by administrative agencies without doing violence to the constitutional separation of powers. Indeed, the Framers carefully preserved the political independence of the judiciary when they provided for life tenure for federal judges. U.S. Const. art III, § 1. As this Court observed in *United States v. Nixon*, 418 U.S. at 704 (citations omitted):

> Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. We therefore reaffirm that it is the province and duty of this Court "to say what the law is. . . ."

CONCLUSION

Statutes "must get their final meaning from judicial construction." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). One leading commentator has observed that deference taken too far not only compromises the judicial function to interpret the law, but also threatens "the basic principle of congressional supremacy in lawmaking, risking as it would administrative subversion of statutory standards." Sunstein, *supra*, at 2093.

For all of the foregoing reasons, the Comptroller's decision to allow all national banks to broker annuities is not entitled to deference, and the judgment of the court of appeals should be affirmed.

Respectfully submitted,

GARY E. HUGHES
ALLEN R. CASKIE
(Counsel of Record)
Phillip E. Stano
American Council of Life Ins.
1001 Pennsylvania Avenue, N.W.
Fifth Floor
Washington, DC 20004-2599
(202) 624-2120

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